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No. 01-283

In the

Supreme Court of the United States

STATE OF UTAH, *et al.*,

Appellants,

v.

DONALD L. EVANS, *et al.*,

Appellees,

and

STATE OF NORTH CAROLINA, *et al.*,

Intervenor-Appellees.

On Appeal from the United States District Court for the District of Utah

MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the three-judge court erred in following *Franklin v. Massachusetts*, 505 U.S. 788 (1992), by holding that the Census Bureau may enumerate federal employees overseas for apportionment purposes, even though it is not practicable to enumerate the other millions of Americans abroad, and by concluding that the inclusion of LDS missionaries would dramatically distort the apportionment count to the benefit of one state contrary to the constitutional purpose of the census?

2. Whether the three-judge court erred in finding that plaintiffs failed to produce any evidence that the Census Bureau's decision not to count the LDS missionaries living overseas imposed a substantial burden on their right to the free exercise of their religion under either the First Amendment or the Religious Freedom Restoration Act?

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MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS

Pursuant to Rule 18.6 of the Rules of the Supreme Court of the United States, Intervenor-Appellees State of North Carolina, *et al.*, move that this Court summarily affirm the Order[1] of the three-judge United States District Court for the District of Utah, dated April 17, 2001, or in the alternative, dismiss the appeal on the ground that the questions raised by the appeal are so insubstantial as to require no further argument. The Order on appeal is based on well-settled principles previously established by this Court, and there is no conflict which requires this Court's resolution.

COUNTER-STATEMENT OF THE CASE

A. STATEMENT OF THE CASE

Appellants in this action are the State of Utah, its governor, congressional delegation and various other elected officials, and four Utah citizens who were serving abroad on Census Day 2000 (April 1, 2000) as missionaries of the Church of Jesus Christ of Latter-Day Saints (hereinafter "LDS"). Appellants brought this action to challenge the apportionment count which resulted from the 2000 decennial census (hereinafter "Census 2000"). Complaint, p. 2.[2] Specifically,

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[1] The Order sought to be reviewed appears in the Appendix to Appellants' Jurisdictional Statement (hereinafter "J.S. App.") at 1a and is reported at 143 F. Supp. 2d 1290 (D. Utah 2001).

[2] The appellants' complaint appears in the Appendix to the federal appellees' Motion to Affirm or, in the Alternative, to Dismiss at 1a.

appellants sought an order directing the Secretary of Commerce and Director of the Census Bureau

> to include within the final apportionment calculation those missionaries of the LDS Church who, like other Utahns and Americans serving abroad in the military or other federal service, were temporarily absent from their usual residence at the time of the census. Alternatively, the Complaint seeks an injunction requiring Defendants to remove the other temporarily abroad citizens from the apportionment count.

Complaint ¶ 3. *See also* N.C. App.[3] at 7a-8a. It was only in their summary judgment reply brief that appellants suggested the alternative of counting all Americans temporarily living overseas. At oral argument, however, appellants conceded that it would not be possible to enumerate all Americans temporarily overseas. *See* N.C. App. at 10a-13a.

North Carolina rather than Utah was certified to receive the 435th seat in the United States House of Representatives based on the apportionment count. Utah contends had federal employees living overseas not been counted or had overseas LDS missionaries been counted, she would have received the 435th seat. Intervenors are the State of North Carolina, its governor and congressional delegation, and various other

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[3] The Appendix to North Carolina Intervenor-Appellees' Motion to Affirm or, in the Alternative, to Dismiss will be referenced herein as "N.C. App.".

elected officials. They intervened in this action to protect North Carolina's entitlement to the 435th seat in the House of Representatives.

Appellants brought this action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; the All Writs Act, 28 U.S.C. § 1651; the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 to 2000bb-4 ("RFRA"); 2 U.S.C. § 2a; the Census Act, 13 U.S.C. §§ 1-196; the Apportionment Clause, U.S. Const. art. I, § 2, cl. 3; the First Amendment; the Fourteenth Amendment; and the Due Process and Equal Protection Clauses [*sic*] of the Fifth Amendment. Complaint, p. 2. At the hearing of this matter, appellants abandoned their equal protection argument. N.C. App. at 8a-9a. This left three claims to be addressed by the three-judge panel: plaintiffs' APA claim, their RFRA and First Amendment Free Exercise Claims, and their Apportionment and Census Act claims.

The three-judge panel dealt easily with the first two of these claims. With regard to appellants' APA argument, the court, relying on *Franklin v. Massachusetts*, 505 U.S. 788 (1992), determined that it is the President's personal transmittal of the apportionment report to Congress that constitutes the final action on the apportionment, and because the President is not an agency, appellants have no standing to challenge the apportionment under the APA. J.S. App. at 8a. The court specifically rejected appellants' attempt to distinguish *Franklin* on the grounds that they were challenging "the discriminatory policy of including [federal overseas employees and military personnel and their dependents] while at the same time

excluding - - and refusing to even gather reliable data on - - similarly situated individuals temporarily living abroad." J.S. App. at 8a n.2. The court held that such a challenge is foreclosed by *Franklin* itself, which notes that it is the President's power to reject or alter the policy decisions made by the Secretary of Commerce with regard to the census and apportionment that renders his decision, and not that of the Census Bureau or the Secretary, the final, binding determination under the APA. *Id.*

The court disposed of plaintiffs' RFRA and First Amendment Free Exercise claims just as easily. The court, while accepting as true the appellants' assertions that missionary work "is one of the most basic and important obligations of the LDS faith," J.S. App. at 10a, accurately found that appellants had failed to present even a scintilla of evidence that the free exercise of religious beliefs of any plaintiff was in any way burdened or tended to be burdened, substantially or otherwise, by the Census Bureau's decision not to enumerate non-federal-employee Americans abroad on Census Day 2000. *Id.* Indeed, appellants conceded at the hearing of this matter that they had no such evidence. N.C. App. 13a. Without any evidence of a tendency to burden, much less an actual substantial burden, plaintiffs failed to carry their burden of proof on their RFRA and First Amendment claims.

With regard to the Apportionment Clause and Census Act claims, the three-judge panel noted that appellants argued that all similarly situated overseas Americans should be treated the same in the apportionment count, such that either LDS missionaries, as persons similarly situated to federal overseas personnel, should have been included in the apportionment

count or federal overseas employees should not have been included in the apportionment count. In assessing the first alternative, the court, again citing *Franklin*, noted that "the 'constitutional goal' underlying the Apportionment Clause is 'equal representation.'" J.S. App. at 12a (quoting *Franklin*, 505 U.S. at 806). It then stated that

> it is indisputable that the 11,159 LDS missionaries from Utah were a very small proportion of the total universe of non-federal-employee Americans abroad for various reasons on April 1, 2000. However, of all LDS missionaries abroad on April 1, 2000 (24,251), a hugely disproportionate number of them (46%) were abroad from Utah.[4]

J.S. App. at 12a. The court determined that, under these circumstances, inclusion of the LDS missionaries in the apportionment count "obviously fails" the constitutional goal of "equal representation" and of "a fair apportionment *for the entire country*." J.S. App. at 12a-13a (quoting *Department of Commerce. v. Montana*, 503 U.S. 442, 464 (1992)). Moreover, the majority of the court determined that the potential claims and constitutional challenges of other groups of Americans overseas if the court ordered inclusion of overseas LDS missionaries in the apportionment count would effectively

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[4] The majority of the three-judge panel rejected plaintiffs' basic assumption - - that LDS missionaries are "similarly situated" to overseas federal employees - - partially on the grounds of this disproportionate representation among states.

require that the census be completely retaken. J.S. App. at 13a-14a. For all of these reasons, the court held that the Census Bureau could not be ordered to include LDS missionaries overseas in the apportionment count.

With regard to appellants' assertions that the Apportionment Clause and the Census Act forbid inclusion of federal employees overseas in the apportionment enumeration if "similarly situated" persons - - such as LDS missionaries - - are excluded, the court found this case indistinguishable from *Franklin*. The court determined that the reasons underlying the decision in *Franklin* - - (1) that overseas federal employees are involuntarily absent from their usual homes at the direction of the federal government; (2) that inclusion of federal employees, unlike inclusion of LDS missionaries overseas, would not hamper the goal of equal representation; (3) that it is constitutionally permissible for the federal employees overseas count not to mirror the resident count and to affect the results of the apportionment count; and (4) that "there is simply no other group which can be as readily identified and dependably counted as federal employees overseas"[5] - - were equally applicable in this case. J.S. App. at 16a-18a. The court refused to require the Census Bureau to exclude federal overseas employees from the apportionment count.

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[5] The court did not, as appellants assert, fail "to come to grips" with the "fact" that enumeration of LDS missionaries can easily be accomplished by "reference to administrative records." J.S. App. at 12. Indeed, the court addressed this very contention, noting that the "administrative records" in question were records maintained by a private organization - - the LDS Church - - and that reliance upon such records by the Census Bureau would create numerous "additional problems in identifying and applying criteria to evaluate the reliability of such records." J.S. App. at 14a n.8.

For these reasons, the three-judge panel denied plaintiffs' motion for summary judgment and granted the federal defendants' and North Carolina intervenors' motions for summary judgment. J.S. App. at 19a. Timely notice of appeal was filed on June 15, 2001. J.S. App. at 21a-22a.

B. STATEMENT OF FACTS

The gravamen of appellants' complaint is the decision by the Census Bureau to count United States military and federal civilian employees (and their dependents living with them) serving abroad by using federal administrative records, but not to attempt to count the unknown millions of other Americans abroad for Census 2000, in particular LDS missionaries. In the process of planning for Census 2000, notice was given that the census would count the stateside resident population as well as Americans who were working overseas for the U.S. Government. *See e.g.*, 63 Fed. Reg. 24, 154 (May 1, 1998). This was the same census population counted in 1990 for purposes of apportionment, a count upheld by this Court as constitutional in *Franklin v. Massachusetts*, 505 U.S. 788. On June 9, 1999, the House Subcommittee on Census, Committee on Government Reform, held a hearing to address several census issues, including the Census Bureau's policy on counting Americans living and working overseas.[6]

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[6] Appearing at the subcommittee hearing were members of the Census 2000 Coalition, a group of organizations representing various constituencies of Americans living abroad who were lobbying Congress to pass legislation requiring the Census Bureau to develop and implement a methodology for counting all non-federally-employed Americans abroad. The group included the American Business Council of the Gulf Countries,

The subcommittee hearing and Administrative Record developed in this case document the impracticability and infeasibility of attempting to obtain an accurate and reliable count of the millions of Americans living abroad. The record showed:

- Previous attempts to count non-federally-employed Americans abroad were abysmal failures. A post-1970 census analysis of the overseas data revealed a significant undercount of private United States citizens differing "substantially from one geographic area to another and from one type of American citizen living abroad to another," "particularly in Canada and Mexico, where the under-enumeration probably exceeded 90 per cent." Admin. Record, p. 1207.

- The Census Bureau cannot accurately estimate the universe of the private overseas population. Within the U.S. border, there is a master address list of every habitable structure so that follow-up efforts to non-respondents -- by mail, by telephone and by personal visits -- can be made. No such list exists for private

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American Citizens Abroad, American Residents Overseas, Democrats Abroad, Republicans Abroad, and the Federation of American Women's Clubs Overseas. Neither the LDS Church, the State of Utah, nor Utah's congressional representatives contributed to the hearing or participated in the Coalition's lobbying efforts. The extensive Administrative Record developed by the Census Bureau on the issue of counting private American citizens overseas is devoid of any input from the LDS Church seeking inclusion of its missionaries serving abroad in the Census 2000 apportionment count. *See* Admin. Record, pp. 01156-01161; 01179-01239; 01274-01280; 01514-01529.

citizens overseas. Admin. Record, pp. 01038, 01160, 01199-01200, 01275-76.

- Estimates of Americans overseas range from three million to ten million, but the real number is unknown. Without the ability to follow up with non-respondents, any attempt to enlist overseas Americans to come forward and be counted converts the overseas census into a "voluntary" census, fundamentally different from the mandatory stateside census. Admin. Record, pp. 01038, 01200, 01207.

- There is no basis for presuming that the response pattern of a voluntary self-enumeration census by overseas Americans would be distributed proportionately among the States. A biased sample would distort the apportionment count, and a self-selected sample is a biased sample. Admin. Record, pp. 01200, 01207, 01210.

- The ease or difficulty of counting Americans in different countries could advantage or disadvantage particular States. For example, it is easier to count civilian Americans living in Saudi Arabia, who must carry passports and who often work for American firms, than it is to count Americans living in Canada, who are not required to have passports and often are retired. It can be assumed that many of the Americans who retired to Canada moved from northern border states such as Maine or Washington, while many who work in Saudi

> Arabia are from oil-producing states such as Texas or Oklahoma. To the extent the census counted a lower proportion of Americans abroad in Canada than in Saudi Arabia, the count would not be neutral with respect to congressional apportionment, and would introduce bias into the allocation of Representatives. Admin. Record, pp. 01038-39, 01200, 01280.

In addition to the extensive Administrative Record filed with the three-judge court by the federal appellees, North Carolina intervenors provided affidavits about some of the other large groups of Americans overseas temporarily who would have a claim for inclusion in the census count comparable to that of the LDS missionaries. *See* Affidavit of Rick W. Fleming (college students studying abroad) and Affidavit of Richard W. Brunson (other missionaries and organizations, not associated with the LDS Church, serving overseas).

As a result of the addition of military and civilian federal employees to the apportionment count, based on "home of record" designations in their personnel records, North Carolina was apportioned the 435th seat in Congress under the method of equal proportions. This increased North Carolina's congressional delegation to thirteen Representatives. Without the federal employees, Utah instead of North Carolina would have been allotted the 435th seat and her number of Representatives increased to four. It is unknown what effect an accurate count of all Americans abroad would have on the apportionment calculation.

ARGUMENT

I. THE DISTRICT COURT FOLLOWED ESTABLISHED PRECEDENTS OF THIS COURT IN UPHOLDING THE CENSUS BUREAU'S RATIONAL EXERCISE OF DISCRETION TO INCLUDE FEDERAL OVERSEAS EMPLOYEES IN THE APPORTIONMENT COUNT AND NOT ATTEMPT TO COUNT OTHER AMERICANS OVERSEAS.

The Census Bureau properly exercised its discretion in determining for purposes of Census 2000 to continue to count military and civilian federal employees serving overseas for purposes of apportionment, while declining to attempt the near impossible - - counting the unknown millions of private American citizens overseas. Contrary to Utah appellants' characterization of the issue, no decision was made *vis a vis* counting or not counting LDS missionaries. LDS missionaries are merely a small segment of the three to ten million Americans living overseas for religious, educational, business or other personal reasons. The Utah judges comprising the three-judge panel in this case correctly concluded, in accordance with well-established principles previously articulated by this Court, that the decisions made for Census 2000 were a "rational exercise" of the "discretion delegated to the Census Bureau to conduct its obligation to enumerate the population for apportionment purposes." J.S. App. at 19a.

A. LEGAL STANDARD FOR REVIEWING CENSUS DECISIONS.

Very little guidance is actually offered by the United States Constitution itself with respect to the Census. The Apportionment Clause is silent on the subject of counting citizens living abroad. Article I, section 2, clause 3, provides that Representatives "shall be apportioned among the several States . . . according to their respective Numbers." As amended by section 2 of the Fourteenth Amendment, this requires "counting the whole number of persons in each State." This "actual enumeration" of the number of persons in each State is to be calculated "in such Manner as [the Congress] shall by Law direct." U.S. Const., art. I, § 2, cl. 3. Pursuant to this provision, Congress has directed the Secretary of Commerce to conduct a census as of April 1 every tenth year "in such form and manner as he may determine." 13 U.S.C. § 141(a) (2000). The Census Act further provides that the Secretary may delegate the authority for establishing census procedures to the Census Bureau. 13 U.S.C. §§ 2,4 (2000). The Census Act also provides no guidance on the question of enumerating citizens living or working abroad.

In reviewing challenges under the Apportionment Clause and Census Act, this Court has concluded that despite the constitutional and statutory commitment of the form, content and manner of the census to Congress and the Executive Branch, decisions by Congress and the Secretary of Commerce concerning the census are not immune from judicial review. *See Montana*, 503 U.S. at 458-49; *Franklin*, 505 U.S. at 801. However, this Court also has recognized that while

technically reviewable, the exercise of judgment by Congress and the Secretary regarding complex census matters requires considerable deference. Because "[t]he text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" Congress' conduct of the census commands great deference. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). "Through the Census Act, Congress has delegated its broad authority over the census to the Secretary [of Commerce]" and the Secretary's discretion "is commensurate with that of Congress." *Id.* at 19-20. This Court has established a deferential standard for reviewing the Census Bureau's conduct of the census "so long as the Secretary's conduct of the census is 'consistent with the constitutional language and the goal of equal representation,' it is within the limits of the Constitution." *Id.* at 19 (quoting *Franklin*, 505 U.S. at 804) (citation omitted). Based on the Constitution's broad grant of authority to Congress, the Secretary's decision on the conduct of the census, "need bear only a *reasonable relationship* to the accomplishment of an actual enumeration." *Id.* at 20 (emphasis added).

As a result of this highly deferential standard, the Supreme Court consistently has upheld the judgment of the Secretary of Commerce against constitutional challenges. *See Id.* at 23 (upholding Secretary's decision not to use a statistical adjustment to the census data as a "reasonable choice" in light of the wide discretion bestowed by the Constitution and Census Act); *Franklin*, 505 U.S. at 806 (upholding Secretary's judgment to allocate federal employees temporarily stationed overseas to their home states as consonant with, though not dictated by, the Constitution); 505 U.S. at 821 n.22 (Stevens,

J., concurring) (recognizing special problems in including overseas personnel in the census requires "difficult judgments" and wide "discretion [is] available to the Secretary").

B. THE ENUMERATION OF MILITARY AND FEDERAL CIVILIAN EMPLOYEES OVERSEAS HAS PREVIOUSLY BEEN AFFIRMED BY THIS COURT.

In *Franklin*, Massachusetts challenged the Census Bureau's decision to include overseas federal employees in the apportionment count, a decision which resulted in the shift of a congressional seat from Massachusetts to Florida after the 1990 census. This Court upheld the Census Bureau's policy of including federal employees assigned to duty overseas:

> [T]he Secretary of Commerce made a judgment, consonant with, though not dictated by, the text and history of the Constitution, that many federal employees temporarily stationed overseas had retained their ties to the States and could and should be counted toward their States' representation in Congress.

Franklin, 505 U.S. at 806. In affirming the judgment of the Census Bureau, this Court further concluded that including federal employees stationed abroad in the apportionment count "does not hamper the underlying constitutional goal of equal representation," but rather "actually promotes equality." *Id.* Although counting overseas federal employees is not required statutorily or constitutionally, because the inclusion of this

population promotes equality, it would have made no sense for the Census Bureau to reverse course for Census 2000 and exclude this finite population that can be accurately enumerated and allocated to the States based on the federal government's own administrative records.

Appellants seek reversal of *Franklin's* holding based on the absurd notion that the federal employee overseas population is a statistical sample prohibited by 13 U.S.C. § 195. *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999) (interpreting 13 U.S.C. § 195 to prohibit the use of statistical sampling in the apportionment count). Appellants' complaint does not allege a cause of action under 13 U.S.C. § 195, although this argument was scantly presented to the lower court. On appeal this contention mistakenly has been expanded as a major theme in appellants' quest for further review.[7]

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[7] Throughout their Jurisdictional Statement, appellants not only characterize the federal overseas count as a form of "statistical sampling," but also suggest that the Census Bureau and the three-judge panel treated it as such. *See, e.g.* J.S. App. at (i) ("federal employees (a) constitute a reasonably representative sample of all Americans living abroad"); 2 ("the district court unjustifiably assumed that overseas federal employees are entitled to preferential treatment because they allegedly constitute a reasonably representative sample of all Americans living abroad"); 10 ("in response to the Bureau's assertion that overseas federal employees constitute a reasonably representative sample of total overseas population, Utah showed that a decision to enumerate them on that basis cannot be reconciled with the Census Act . . . which categorically prohibits the use of statistical sampling in the apportionment count"); 12 ("the district court failed even to acknowledge Utah's argument that, to the extent defendants are correct in suggesting that the federal employee segment of the overseas population can be considered a "representative sample" of the full overseas population, the Bureau's partial count is unlawful under the Census Act . . . as an impermissible attempt to introduce sampling in the apportionment

Sampling is a statistical notion using random selection from a population to extrapolate characteristics of the sample to the total population from which it is drawn. *See generally House of Representatives*, 525 U.S. at 22-26. The enumeration of federal overseas employees is not a statistical sample - - it is an exhaustive count of the entire known and finite universe of such employees. The lower court did not affirm the policy to include federal overseas employees based on the notion that this group of Americans was a "representative sample," as appellants mistakenly assert. Rather, the lower court correctly noted that this population comes from all fifty states, and that the distribution of this group among the fifty states, while not precisely mirroring the distribution of the resident state populations, "does not present any extreme variations among the states." J.S. App. at 17a. *See also* Declaration of Lara J. Wolfson (March 5, 2001), Exhibit B, N.C. App. at 1a (appellants' summary judgment exhibit illustrating that the federal overseas population for each state falls generally along

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count"); 14 ("the Bureau is now authorized to treat overseas federal employees as a representative 'sample' of all Americans living abroad"); 16 ("in upholding the Bureau's decision to enumerate only a subset of the total overseas population, the district court reasoned in essence that overseas federal employees constitute a statistically representative sample of the entire overseas population"); 17 ("To the extent the district court and the Bureau are correct in suggesting that overseas federal employees constitute a representative sample of the total overseas population, any decision to enumerate them on that basis runs afoul of the Census Act"); 18 ("the Bureau attempted to estimate an arbitrary subset of [the relevant overseas] population"); 20 ("overseas federal employees constitute an arbitrary, non-representative segment of the total overseas population, the distribution of which differs significantly from that of the domestic resident population").

the resident population baseline with no unusual outliers). The lower court's discussion does no more than recognize this Court's holding in *Wisconsin*, which establishes "distributive accuracy" to be a core principle to apply in determining the accuracy of House apportionment. *See Wisconsin*, 517 U.S. at 20 ("the Secretary's decision to focus on distributive accuracy is not inconsistent with the Constitution. Indeed, a preference for distributive accuracy (even at the expense of some numerical accuracy) would seem to follow from the constitutional purpose of the census, *viz.*, to determine the apportionment of the Representatives among the States"). Appellants deliberately misconstrue the Court's valid concern about distributive accuracy with statistical sampling.[8] The three-judge panel correctly followed this Court's decision in *Franklin* regarding the inclusion of federal overseas employees in the apportionment count.

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[8] The unwarranted expansion of appellants' sampling theory in this case is no doubt related to a second pending lawsuit by the same appellants challenging the Census Bureau's use of imputation in calculating the apportionment count as statistical sampling prohibited by 13 U.S.C. § 195, *see* J.S. at 2-3 n.1, a case which likely will result in an appeal to this Court. By attempting to create a non-existent "sampling" issue in this case, appellants are apparently attempting to mislead the Court into assuming that the two cases are related and it should refrain from summarily affirming this case until after the separate action, which directly raises a statistical sampling question under 13 U.S.C. § 195 and the Constitution, reaches the Court. This case, however, revisiting *Franklin's* treatment of federal overseas Americans is completely unrelated to the second pending action, which seeks to extend the prohibition on statistical sampling articulated in *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, to the Census Bureau's long-standing practice of imputation.

C. INCLUSION OF LDS MISSIONARIES IN THE APPORTIONMENT COUNT WOULD VIOLATE THE CONSTITUTIONAL GOAL OF EQUAL REPRESENTATION.

Nine months after the conduct of Census 2000, and immediately after the announcement of the apportionment results, appellants ran to the courthouse claiming that Utah has a population of LDS missionaries serving overseas, which, if counted, would alter the reapportionment of Representatives so that Utah would acquire a fourth Representative and North Carolina would lose her newly allotted thirteenth Representative. Prior to Census 2000, the Utah plaintiffs and the LDS Church never sought a decision by the Census Bureau or Secretary of Commerce to include their overseas missionaries in the census enumeration. The three-judge panel properly concluded that such an *ad hoc* action would not further the constitutional goal of equal representation, and further, would undermine another goal of the Apportionment Clause, distributive accuracy. J.S. App. at 13a.

The Utah plaintiffs presented the court with an affidavit based on LDS Church records regarding the number of LDS missionaries from each state serving abroad at the time of Census 2000, along with their "permanent" or "home" states. *See* Affidavit of Robert P. Swensen, Exhibit A. These records showed 11,176 LDS missionaries from Utah and 107 LDS missionaries from North Carolina, although North Carolina's resident population is over eight million people, while Utah's

resident population is slightly more than two million people.[9] Thus, a hugely disproportionate number of LDS missionaries living abroad (46%), were from Utah. In contrast to the graph illustrating that the federal overseas population for each state falls generally along the resident population baseline, a graph of the distribution of LDS missionaries by state illustrates the disproportionate bias toward Utah created by this group of missionaries. *Compare* N.C. App. at 1a with N.C. App. at 3a (Second Affidavit of P. William Tillman, Jr., Exhibit D).

The three-judge court correctly concluded, under these circumstances, that the inclusion of overseas personnel from one religious group which would dramatically advantage one state would impermissibly undermine the constitutional goal of distributive accuracy. *See* J.S. App. at 13a n.7. The court also recognized the chaotic potential such a result could produce, with other groups of Americans abroad for religious or other purposes, including students, business persons, retirees, and numerous others overseas for charitable or humanitarian reasons, each coming forward in federal court making the same argument as the LDS missionaries. J.S. App. at 13a. These other groups could also claim close home-state ties and available administrative records, and offer themselves up for enumeration, without ever having presented themselves to the Census Bureau when Census 2000 was in the planning stages.

It was not feasible to count all non-federally employed Americans overseas for Census 2000, so the exercise of discretion by the Census Bureau *not* to count such overseas

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[9] North Carolina's resident population is 8,049,313; Utah's resident population is 2,233,169. *See* Second Affidavit of P. William Tillman, Jr., Exhibit A.

Americans, including LDS missionaries, was reasonable, is not required by the Constitution,[10] and is consistent with the goal of equal representation. *See* Argument D, *infra*. The lower court properly declined to intrude on the Secretary's exercise of discretion by allowing one state to manipulate the census enumeration in a manner which would so obviously distort the distributive accuracy of the apportionment count to the advantage of that state.

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[10] Appellants' suggestion that the Census Bureau augment the apportionment count by adding LDS missionaries based on LDS Church records raises additional concerns under the First Amendment's prohibition of establishment of religion as well as the Fifth Amendment's guarantee of equal protection. Requiring the Census Bureau to rely on LDS Church records for purposes of performing its duty to conduct the census would constitute a "fusion of governmental and religious functions" and an improper delegation or sharing with the LDS Church of the constitutional duty to conduct the census. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982). The Establishment Clause also will not permit requiring the Census Bureau to include LDS missionaries in the apportionment count without also including other missionaries - - *e.g.* Baptists, Presbyterians, Roman Catholics, Lutherans, and members of non-denominational groups. Appellants seek preferential treatment for LDS missionaries which is prohibited by the Constitution. *See, e.g., Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 703 (1994). Similarly, the denominational preference sought for LDS missionaries risks violating the equal protection guarantees of the Fifth Amendment. *See Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339-39 (1987) (distinctions made on religious grounds among religious groups are subject to strict scrutiny).

D. THE CENSUS BUREAU MADE A REASONED CHOICE CONSISTENT WITH THE CONSTITUTION NOT TO ATTEMPT TO COUNT ALL AMERICANS OVERSEAS AND APPELLANTS LACK STANDING TO CHALLENGE THAT DECISION.

In *Franklin*, this Court left open the possibility that the Secretary of Commerce and Census Bureau might, at some later point in time, permissibly conclude that it is practicable and feasible to enumerate all Americans overseas at the time of the census. When this Court concluded that the Constitution does not "dictate" counting Americans overseas, although the reasoned judgment to count federal employees serving overseas is "consistent" with the text and history of the Constitution, *Franklin*, 505 U.S. at 805, it knew full well that there were other Americans overseas who maintained ties to their home states who were not being counted. In this case, the federal appellees presented the lower court with an administrative record replete with practical and policy reasons why the time to count all Americans overseas has not yet come. *See, e.g.*, Statement of Facts, *supra* at 8-10.

Although the idea of counting all Americans was a late-blooming one for appellants - - it was not pled in their complaint - - they now rely heavily on it as an alternative theory. Appellants, however, lack standing to pursue the cause of counting all Americans overseas. The number of Americans living, working and traveling abroad, who maintain ties with their home states, is unknown. Appellants themselves suggested an overseas population of three to seven million, *see* Declaration of Lara J. Wolfson (5 March 2001) ¶ 15, while the Census Bureau and others estimate the number between three

and ten million, *see* Admin. Rec., p. 1200, 1207. Indeed, it appears obtaining an exhaustive and reliable count is simply not feasible. *See* Statement of Facts, *supra* at 8-10. Appellants themselves conceded to the three-judge panel that counting the universe of all Americans overseas is not practicable. *See* N.C. App. at 10a-13a.

Without a reliable and complete count of *all* Americans overseas, which includes designations of continuing ties to individual states, no one is in a position to establish which, if any, state or states would gain or lose Representatives as a result of adding such an enumeration to the apportionment count. Appellants cannot show a source of accurate data establishing or even *estimating* the unknown three to ten million Americans who were abroad at the time of Census 2000; consequently, they cannot show that Utah would gain an additional Representative if the apportionment of seats were done based on non-existent data.[11] The Utah appellants, similar to the Massachusetts plaintiffs in *Franklin*, therefore, lack standing to challenge the non-count of non-federally employed

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[11] North Carolina Intervenor-Appellees provided the lower court state-by-state data regarding the number of college students reported to be studying abroad. Utah appellants' expert devised a table which established three different distribution patterns among the states for overseas LDS missionaries, federal employees and college students if these populations were allocated back to their recorded home states. *See* Declaration of Lara J. Wolfson (March 5, 2001), Exhibit C. It is not possible, therefore, to predict from these separate patterns what the distributive pattern would be if all Americans overseas could be reliably counted. The only reasonable prediction is that there would be another separate and distinct distribution pattern among the states for this presently unknown population, and that pattern would be unlikely to match any of the other distributive patterns.

Americans abroad under the Constitution or the Census Act. 505 U.S. at 802.

While it is true that *Franklin* does not foreclose the Secretary's option to include in the apportionment count non-federally employed Americans living overseas who have maintained ties to their home states, such an attempt may "amount[ ] to a technical impossibility" since this population does not constitute a clearly defined and verifiable universe. Admin. Record, p. 01013. The Census Bureau recommended against a proposed law to count all private U.S. citizens abroad "because it is neither feasible nor practical to enumerate and allocate" this population to the States. *Id.* By contrast, the Census 2000 plan included the use of official administrative records to enumerate federally-affiliated U.S. citizens in the apportionment count "because their service - - and thus residence - - abroad is temporary and a condition of their employment with the government." *Id.* There is, however, "no definite, accurate and verifiable standard for enumerating the remaining category of U.S. citizens, that is, private citizens living abroad." *Id.* *See also* Statement of Facts, *supra* at 8-10.

The Constitution and *Franklin* would permit the future enumeration of all Americans abroad for apportionment purposes if, but only if, the count is reliable and unbiased. As the former Census Bureau Director testified before Congress when asked if it would be feasible to count all Americans overseas in 2010:

> If we started with some better sense of what the base population looks like and how they are distributed and what the quality of the

> administrative records are of universities who send many, many scientists abroad, churches who send many, many missionaries abroad and corporations who send many, many employees abroad and the retiree population who simply lives abroad . . . We need a map of the phenomena before we would be comfortable doing the level of job which we could come back and recommend to the Congress that it become a part of the apportionment counts.

Admin. Record, p. 01207. Because Congress has broad discretion in dictating the form and content of the census, the Utah plaintiffs, which include all of the State's Senators and Representatives, were uniquely situated during the preparations for Census 2000 to draw Congress' attention to the population of Americans living abroad, including LDS missionaries, who were not going to be counted and included in the apportionment count. Their *post hoc* complaints cannot support a finding based on this record that the Secretary of Commerce and Census Bureau made anything other than a reasonable judgment by deciding not to count all overseas Americans.

The test for reviewing this challenge to the Census Bureau's exercise of its discretion to determine the manner in which the census is conducted is whether the decision is "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 505 U.S. at 804, and bears "a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census,"

Wisconsin, 517 U.S. at 20. Where several policy choices are open to the Census Bureau in the exercise of its "virtually unlimited discretion" to conduct the census, *id.* at 19, the lower court properly chose not to intrude into the decision as to those choices, in the absence of some discernable "single constitutionally permissible course," *Montana*, 503 U.S. at 463. *See also Bethel Park v. Stans*, 319 F. Supp. 971, 979 (W.D. Pa. 1970) ("[t]he mere fact that an alternative method of enumeration may exist does not lead to the conclusion that the method employed is arbitrary or any less within the discretion of the Bureau").

Appellants have conceded that attempting to count the unknown millions of Americans who were overseas at the time Census 2000 was conducted is not feasible. *See* N.C. App. at 11a. Without a reliable means of enumerating this population, bias in favor of certain states likely would result, *see* Statement of Facts, *supra* at 8-10, which would undermine the constitutional goals of equal representation and distributive accuracy. The decision not to enumerate private Americans overseas rested, at least in part, on a reasoned determination that there was no way to ensure for Census 2000 that any such count would be either numerically or distributively accurate. The three-judge court properly concluded that the decision to count federal overseas employees, but not to count all other Americans overseas, including LDS missionaries, was a rational exercise of the Secretary's and Census Bureau's discretion in meeting their obligation to enumerate the population for apportionment purposes.

II. THIS CASE PRESENTS NO QUESTION OF THE IMPOSITION OF A "SUBSTANTIAL BURDEN" ON THE FREE EXERCISE OF RELIGION, EITHER UNDER THE FIRST AMENDMENT OR THE RELIGIOUS FREEDOM RESTORATION ACT.

The Bureau's decision not to count Americans living overseas except for federal personnel imposes no substantial burden on the right of LDS missionaries to the free exercise of their religion. The decision, therefore, violates neither the RFRA, 42 U.S.C. § 2000bb (2000), nor the Free Exercise Clause of the First Amendment. The LDS petitioners, however, would have RFRA extended to restrict not only governmental actions that *actually* impose a substantial burden on the exercise of a religious practice, but also actions which might have "'a tendency to coerce individuals into acting contrary to their religious beliefs.'" J.S. at 25, citing *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 450-51 (1988)), *cert. denied*, 519 U.S. 821 (1996). Petitioners' expansion of RFRA contradicts the plain language of the Act and misinterprets this Court's holdings regarding burdens on the free exercise of religion in violation of the First Amendment.

"The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner of Internal Revenue,* 490 U.S. 680, 699 (1989). RFRA provides in pertinent part that "Government shall not

substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." 42 U.S.C. § 2000bb-1(a) (2000). The decisions of this Court are replete with cases discussing governmental actions that were found or not found to be substantial burdens on the practice of religion. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878) (upheld statute banning religion-based polygamy); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (upheld Sunday closing law burdening Orthodox Jews); *Sherbert v. Verner*, 374 U.S. 398 (1963) (struck denial of unemployment benefits to Seventh Day Adventist who worshiped on Saturdays); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (struck denial of unemployment benefits to Jehovah's Witness who quit job because of his anti-war religious scruples against producing armaments); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (struck denial of unemployment benefits to Seventh Day Adventist who quit job because religious beliefs prevented her from working on Saturdays); *Bowen v. Roy*, 476 U.S. 693 (1986) (upheld governmental use of social security number contrary to Native American religious belief); *United States v. Lee*, 455 U.S. 252 (1982) (upheld social security taxes contrary to Amish religious beliefs); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (upheld logging and road building on land sacred to Native Americans); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (upheld statute banning peyote usage even for sacramental purposes).

Petitioners conceded at the hearing in the court below that they had not produced any evidence that any LDS

missionary weighed his not being counted in the census against his duty to answer the call for service as a missionary in another country. N.C. App. at 13a. They proffered only the declaration of Plaintiff Michael Wayne Anderson, who testified that he had "recently completed a two-year mission for the LDS Church in Maracaibo, Venezuela," and that "performing missionary work . . . is one of [his] most important obligations as a member of the LDS Church." N.C. App. at 5a. (Anderson Declaration ¶¶ 2, 4); J.S. App. at 10a. He did not state that he considered his being counted or not counted in the census in deciding whether to perform his church mission. Petitioners now contend that the imposition of an unknown burden is sufficient to meet the requirements of RFRA. They say, "Any other rule would reward the government for concealing the practical effect of religious discrimination." J.S. at 26. This argument fails for at least two reasons. First, that the Bureau would not count non-federal personnel living overseas for an indefinite period of time was well known, at least since *Franklin* was decided by this Court in 1992. Despite the lobbying of other overseas advocacy groups, as noted above, the Bureau made it clear well in advance of Census 2000 that it would not count persons who were not federal personnel living overseas. Second, there was no religious discrimination by the Bureau - - all non-federal personnel were treated alike. Persons living abroad for religious reasons were treated no differently from those who were abroad for business, educational, charitable, or other personal reasons. The decision not to count non-federal personnel was truly a neutral rule of general applicability. *Compare Church of the Lukumi Babalu Ave., Inc. v. City of*

Hialeah, 508 U.S. 520 (1993) (facially neutral ordinance not neutral in intent or practice).

But, irrespective of whether the Bureau's policy of counting only federal personnel was known by persons contemplating LDS missionary service, the policy did not impose a substantial burden on them. To violate either the First Amendment or RFRA, a government policy must impose a substantial burden on the free exercise of a person's religious beliefs. The fact that a person's missionary service might possibly affect a state's representation in Congress is simply too attenuated to be considered a substantial burden on the free exercise of one's religion.

The decision of the court below in finding that there was no evidence of any governmental action imposing or tending to impose a burden on the right of LDS missionaries to practice their faith, was consistent with the holdings of this Court. Consequently, there was no violation of either RFRA or the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, the motion to affirm or, in the alternative, to dismiss should be granted.

Respectfully submitted,

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October 15, 2001

APPENDIX

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DECLARATION OF LARA J. WOLFSON (MARCH 5, 2001)
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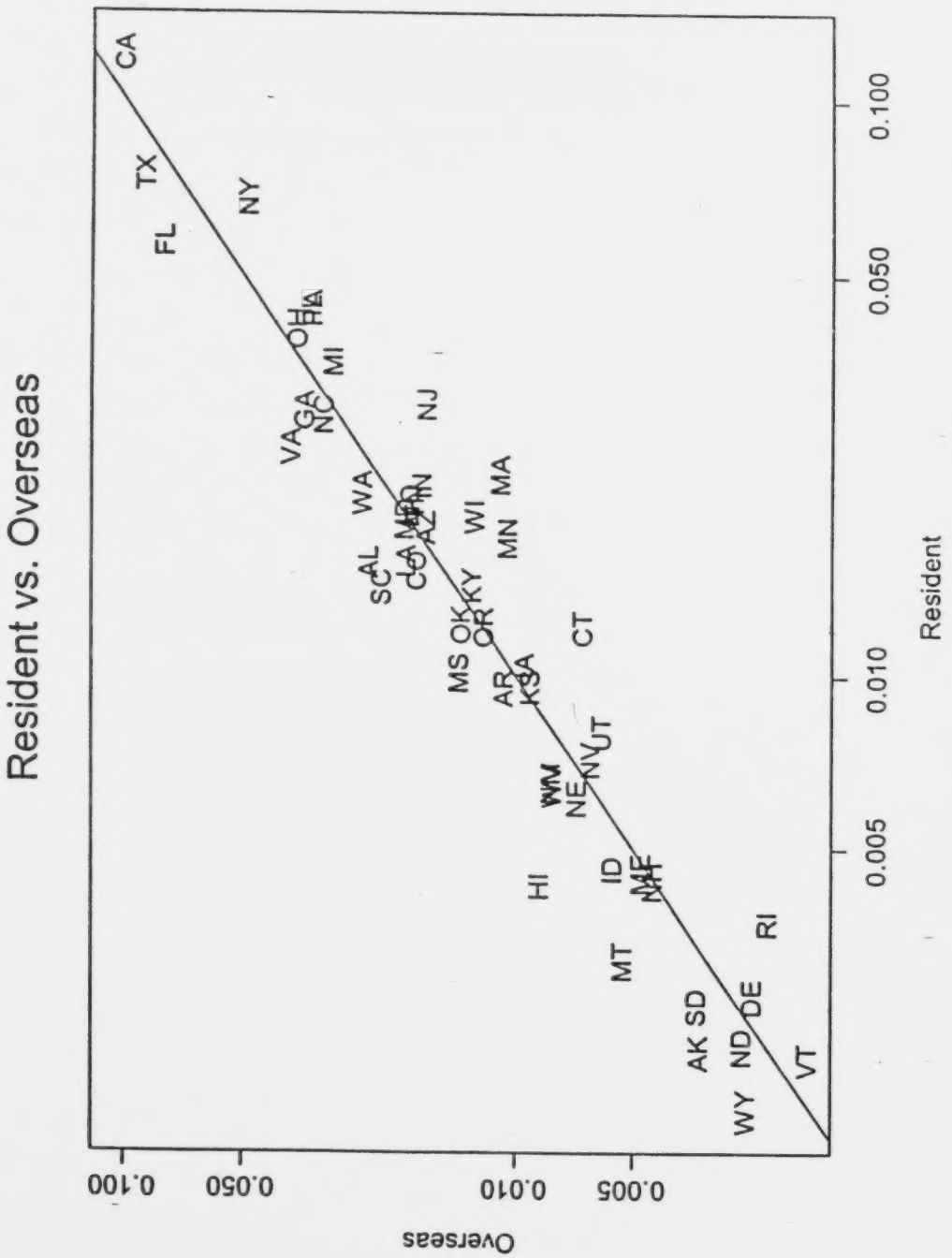

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SECOND AFFIDAVIT OF P. WILLIAM TILLMAN, JR.
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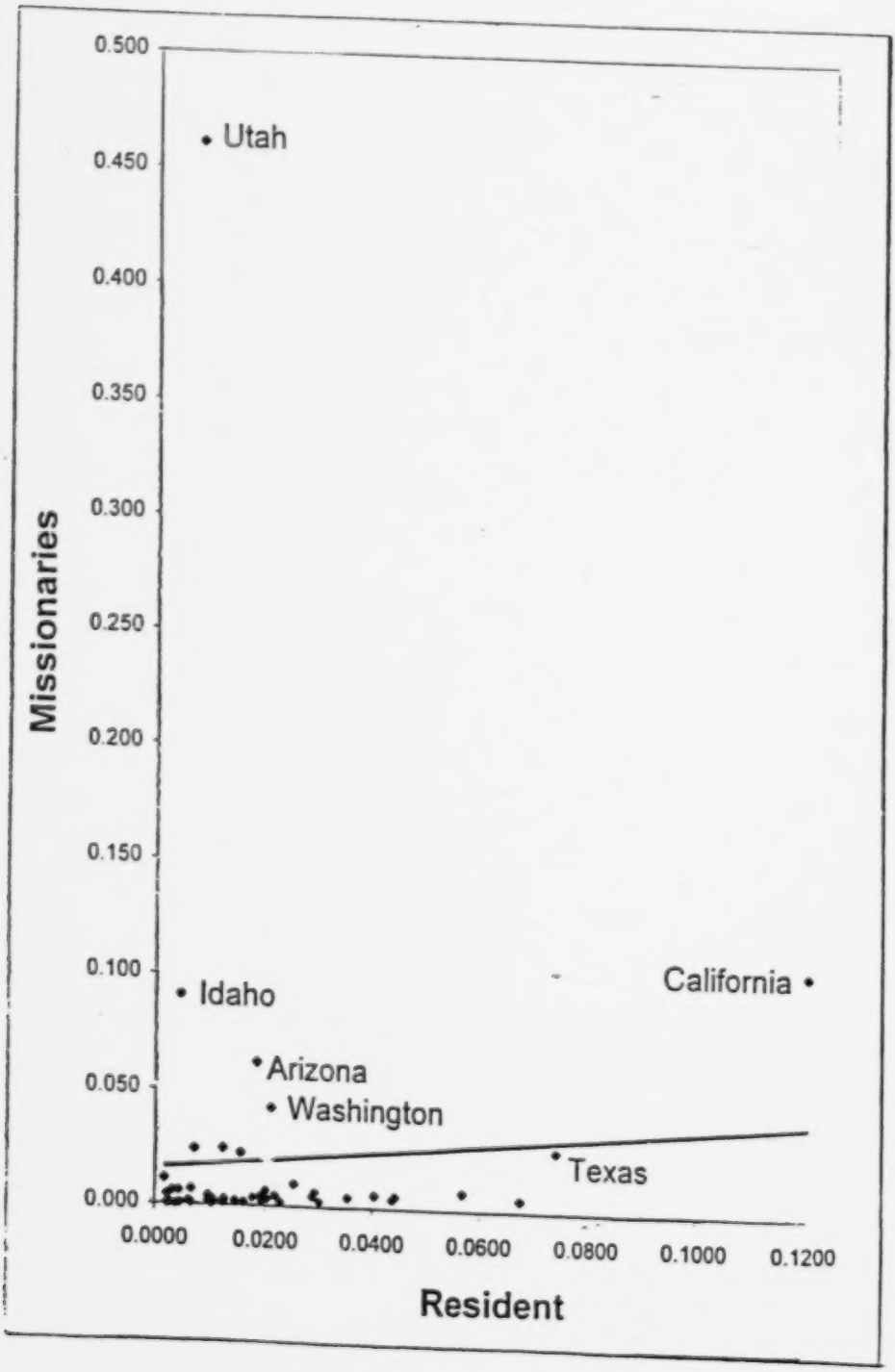

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DECLARATION OF MICHAEL WAYNE ANDERSON [CAPTION OMITTED FOR PRINTING]

I, Michael Wayne Anderson, do hereby declare the following:

1. I am a lifelong member of the Church of Jesus Christ of Latter-day Saints (the "LDS Church" or "Church"), and a permanent resident of the State of Utah.

2. I recently completed a two-year mission for the LDS Church in Maracaibo, Venezuela.

3. While serving in Venezuela, I paid income taxes to the State of Utah and to the federal government on dividends earned from three stock investments.

4. I sincerely believe that performing missionary work – which involves both proselytizing and community service – is one of my most important obligations as member of the LDS Church.

5. I sincerely believe that the Church's scriptures (which include the Holy Bible, Book of Mormon, Doctrine and Covenants, and the Pearl of Great Price) and leaders teach that Jesus Christ calls his servants to minister to their fellow men.

6. I sincerely believe that, as a member of the LDS Church, I have a spiritual obligation to be a good citizen at all times. I also believe that I was still under that obligation while on my mission.

7. When I decided to serve a mission, I met with my bishop, who determined that I was worthy and otherwise eligible to serve a mission. As part of the application process, I completed detailed paperwork informing the Church of my

home address, parents' names, family situation, and ward membership. The bishop then submitted this information to higher church authorities. Eventually, I received a formal call to serve from the President and Prophet of the Church. I consider that all to be analogous to the missionary call that the Apostle Paul received in the New Testament.

8. My call to serve specified both the time period during which I would serve and the geographic area in which I would labor. I believe that both aspects of the call were divinely inspired.

9. While I was on my mission, I stayed in close contact with my family and with my family and with other permanent residents of Utah. All of my personal possessions were stored at my home of residence in Orem, Utah.

10. I returned to Utah immediately at the conclusion of my mission.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 30, 2001.

/s/ Michael Wayne Anderson

MOTION HEARING (EXCERPTS)
MARCH 28, 2001

[*6] JUDGE ANDERSON: It is not enough to satisfy me that you say the principal relief. With respect to the injunctive relief, the only relief that you seek is either, A, the inclusion of LDS missionaries in the census or, B, the elimination of federal employees who were included in the census. That is the only injunctive relief asked for, right?

MR. LEE: That is correct, Your Honor.

JUDGE ANDERSON: Okay. In your reply brief then where you expand that universe to a third one, and you do it several times finally culminating on page 88 of your reply brief saying, look, it can be any group. The Census Bureau can count any similarly situated group and we can't figure out who that might be but they can count anybody. You expand the universe for injunctive relief beyond LDS missionaries, and I trust that we may read your reply brief and all references to [*7] any group other than LDS missionaries as not being included in your injunctive relief request.

MR. LEE: That is correct with regard to the injunctive relief that we have requested in the second amended complaint.

JUDGE ANDERSON: Okay.

MR. LEE: The second amended complaint, however, also seeks a declaration - -

JUDGE ANDERSON: No, I understand that. I'll get to that in a minute. But the only action, other than a declaration the only action that you ask for from this Court deals with including LDS missionaries, period, or excluding the counted

federal employees. I mean, that is the only action other than the declaration that you have asked for?

MR. LEE: That is correct.

* * *

[*8] JUDGE ANDERSON: My third question goes to your equal protection claim. In the complaint among the grievances alleged there is an allegation that the equal protection clause has been violated, the equal protection clause of the Fifth Amendment has been violated.

Than when I look at your briefs in the case I do not see equal protection mentioned in any argument heading. And looking further I look at page 15 of your opening brief where you summarize prior to the beginning of your argument the statutes and the constitutional provisions that you think were violated. On page 15 equal protection is conspicuously omitted from that group. You do mention equal protection in **[*9]** two sentences in four lines in footnote four on page 23 and do not return to it again. In your 88 pages of reply brief it is not mentioned at all. Since you have not developed your argument on equal protection isn't the Court justified in assuming that that argument is out?

MR. LEE: We have raised it rather feebly as Your Honor has pointed out only in a footnote. We certainly don't think that it is one of our stronger claims.

JUDGE ANDERSON: Well, I would go even further than that. I think the Court is entitled when the parties do not develop an argument to the Court and support it with authorities to ignore the argument. I just would like to have a

candid response from you as to whether or not we should try to imagine the argument you would make and then set them up and then try to answer them, or whether we can simply ignore that part of the complaint?

MR. LEE: Candidly, Your Honor, that is perfectly appropriate. We have not developed the argument. We have suggested it only in a couple of sentences. If those sentences are not enough to establish our entitlement to judgment as a matter of law on equal protection, we are not asking the Court to develop the argument for us.

* * *

[*11] JUDGE ANDERSON: Let's just pursue it one step further. You cite one case in footnote four, Nordlinger versus Hahn. That case articulates the standard of review or the test to be a rational basis test. And so if you pursue your equal protection argument I trust that it would be that we would be looking at it from a rational basis standpoint as the test?

MR. LEE: Yes, Your Honor. And I think that goes **[*12]** back to my answer to Judge Benson's question, which is whether there is a rational basis here I think is most properly analyzed under the apportionment clause in the Census Act, which are the provisions directly aimed at the question before the Court today. And it is on that sort of an approach that we decided to relegate our equal protection argument, our rational basis argument to a footnote.

* * *

[*22] JUDGE ANDERSON: As a practical matter, Mr. Lee, and you have gone through and I have 180 pages of hearings in 1999 on the 2000 census, we have the Census 2000 contingency committee represented by democrats abroad and republicans abroad and Americans abroad, businesses with employees abroad, and I might add no one from Utah, nobody from the LDS church, but this thing has been studied and studied and studied. The conclusion was these people you refer to as these, quote, hypothetically similarly situated people are uncountable.

So Congress told the Secretary of Commerce to study it some more and come back this September with a report on any means to count. Now, you tell me if you see it any differently. I mean, you say, well, we don't have the means, but you have studied it and I propose to you that the Census Bureau has amply demonstrated it does not have the means. If so then the only way you can lead us to a decision in this case is to exclude federal employees abroad. That is kind of a speech but it illustrates how I just keep going around and around in my head about what you can practically ask this Court to do that makes any sense at all.

MR. LEE: That may be the only practical remedy, Your Honor.

* * *

[*25] JUDGE ANDERSON: Okay. I just want to interrupt you one more time because I am having a hard time getting comfortable with this proposition in my mind.

The concept of similarly situated persons, as far as you are concerned once you get beyond federal employees and LDS missionaries, is amorphous.

MR. LEE: Correct, in the sense that there is not any data with regard to any other groups before the Court.

JUDGE ANDERSON: And do you acknowledge that it would be virtually impossible within any reasonable time frame to get data sufficiently valid and accurate to advance the goal of equal representation on a similarly situated basis?

MR. LEE: I don't have any reason to disbelieve **[*26]** that proposition.

JUDGE ANDERSON: Okay. And you are not, I take it, asking that we order that the 2000 census be retaken?

MR. LEE: No, Your Honor.

Again, going back to our declarative relief, the declarative relief would be a statement that similarly situated persons ought to be treated similarly. Probably that means excluding isolated segments of the population.

JUDGE ANDERSON: Which would be excluding the federal people abroad, which is in your injunctive relief paragraph - -

MR. LEE: Correct.

JUDGE ANDERSON: - - or including LDS missionaries because they are sufficiently similar.

MR. LEE: Correct.

* * *

[*27] JUDGE ANDERSON: . . . Because as a practical matter nothing can be done to search out, quote, other similarly

situated people with any accuracy. So we are down to the very simple proposition, either include LDS missionaries along with federal employees abroad or exclude federal employees abroad. Isn't that what this case finally comes down to as far as our job as a Court is concerned?

MR. LEE: It may, Your Honor, although I don't think the Court needs to presuppose the question of whether there might be other groups who could come forward very quickly like LDS missionaries who might be included.

JUDGE ANDERSON: Mr. Lee, really, again, in all candor, that is going to be wildly haphazard. The Southern Baptists might come forward, we have the Brunson Affidavit **[*28]** here from North Carolina saying that there are 5,000 some odd Southern Baptist missionaries out there, 5,000 some odd students abroad that they have included or that they could include, and then 4,000 in another year and far higher than Utah. The Red Cross might come forward, maybe not, the Jehovah's Witnesses might come forward, maybe not. For all I know the Rastafarians may come forward. How do we know? There is no conceivable way that we can go beyond this LDS group without getting into just wildly inaccurate supposition.

Isn't that right?

MR. LEE: Well, that may be true. All I am saying is I don't think the Court needs to prescribe an answer to that question to the Census Bureau. An order that simply says treat similarly situated members of the overseas population similarly would take care of the problem, because then if the Bureau is right as I suspect it is and Your Honor says that it is, that you could not conduct this broad enumeration of the total population that the constitution requires, then the result is it is

almost certainly going to be a result of exclusion rather than inclusion.

* * *

[*90] JUDGE ANDERSON: The Wayne Anderson affidavit does not say one word about coercion.

MR. LEE: Correct.

JUDGE ANDERSON: It does not say one word about hurt. Wayne Anderson did not say that when he got his mission call he was put to the Hobson's choice of going home and puzzling over whether he should go on his mission or stay home and be enumerated.

Now, I ask you again, where in this record is there actual evidence of, in fact, coercion or a tendency to coerce on any of these plaintiffs who have standing?

MR. LEE: I don't think there is evidence that any individual plaintiff considered the possibility, that that plaintiff might not be counted in the census, and that in turn if not counted in the census might have his vote diluted. There is similarly no evidence in the record that any plaintiff considered not serving a mission.